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SUPREME COURT U.S.

No. 06-10119

IN THE
Supreme Court of the United States

ALLEN SNYDER,
Petitioner,

versus

STATE OF LOUISIANA
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Louisiana

BRIEF OF *AMICUS CURIAE* LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF AMICUS CURIAE

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission, includes participation in the legislative process in matters pertaining to criminal law and procedure and, occasionally, acting as amicus curiae in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amici* in appropriate cases.[1]

ARGUMENT

I. Introduction and Summary of Argument

In its decisions in *Swain*, *Batson* and now *Miller-el*[2] this Court has fought a losing battle to ensure that a State does not strike any black jurors because of their race while continuing to preserve the peremptory challenge despite its inherent potential to allow such discrimination.

Last month marked the 21st birthday of the *Batson* decision and it is an unhappy coming of age. The sad fact of life is that *Batson* is not achieving its objectives in Louisiana.

A review of the jurisprudence from the Louisiana Supreme Court and the application of the *Batson* standard in that court and Louisiana's intermediate courts of appeal reveals that it is virtually impossible for a criminal defendant

[1] Counsel for the parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for a party. No person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] *Swain v. Alabama*, 380 U.S. 202 (1965); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005)

to succeed on review of a *Batson* claim under the standard as applied in Louisiana.

This is particularly true given the expansive application of "great deference" to even the most scant trial court rulings. The only time the Louisiana Supreme Court has ever overcome this great deference was where the prosecutor's stated reason for striking the juror was that he was a single black male. *State v. Harris*, 820 So. 2d 471 (La. 2002) Nothing else has been sufficient.

In fact, the appellate record in Louisiana sees *Batson* doing more to protect white prospective jurors from being excluded than blacks.

In the Parish from which this case arises a massive review of jury selection has proven that notwithstanding *Batson*, prosecutors strike black jurors at more than three times the rate they strike white jurors. Outside the artificial bounds of the Louisiana Supreme Court's *Batson* analysis, the reality is that Mr. Snyder, an African American, was sentenced to death by an all white jury in a Parish blighted by racial tensions where only four years earlier David Duke, former Grand Wizard of the Ku Klux Klan, was serving as the duly elected state Representative.

The majority in the Louisiana Supreme Court engaged in an analysis that appears to draw more from the dissent, than the majority in *Miller-el*.

If the narrow and supremely deferential approach taken by the majority is accurate then *Batson* rulings in Louisiana will remain essentially unreviewable and the promise of equal protection will continue to be frustrated.

This Court must intervene to correct the Louisiana Supreme Court's erroneous application of *Batson*, or to revisit *Batson* and peremptory challenges as a whole, to provide more effective protection for criminal defendants and minority jurors.

II. This Court has fought a losing battle to establish a standard of review that accommodates both the

peremptory challenge and the guarantees of Equal Protection

By operation of the Equal Frotection clause, a criminal defendant has the right to trial by a jury whose members are selected by a non-discriminatory criteria and every citizen selected for jury service has the right not to be excluded from a particular petit jury on account of race. *Powers v. Ohio*, 499 U.S. 400 (1991). However, there is an inherent potential in the peremptory challenge to distort the jury process by permitting the exclusion of jurors on racial grounds. *Batson*, 107 (1986) (Marshall J. concurring)

In *Swain* this Court "sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control". *Batson* 92-3 The result was a mechanism for the enforcement of Equal Protection rights that left prosecutor's peremptory challenges "largely immune from constitutional scrutiny." *Batson* 92-3.

Recognizing the "crippling" burden the *Swain* standard imposed upon a criminal defendant, this Court persevered with the peremptory challenge but reset the evidentiary formulation, particularly as to the establishment of a *prima facie* case. *Id.*

Batson permitted an individualized focus on the conduct of the state in the particular case but even as the new formulation was announced, it was predicted that there would be insurmountable problems in prosecutorial and judicial enforcement. *Batson*, 102-3 (Marshall J. dissenting).

While noting Justice Marshall's predictions, the Court proceeded on the assumption that in light of its holding prosecutors would exercise challenges only for legitimate purposes and that trial courts would be willing and able to identify *prima facie* cases of discrimination and conscientiously perform their duties. *Batson, n.22.*

Almost twenty years later, this Court acknowledged the continuing difficulty in "ferreting out discrimination in selections discretionary by nature". *Miller-el, 238.* The Court emphasized that defendants could rely upon the broad

net of *Swain* as well as the individualized focus of *Batson* and provided an example of that analysis at work. *Miller-El, 239-40.* Unfortunately, it is doubtful whether in practical terms the whole described in *Miller-el* is any greater than the sum of its insufficient parts (*Swain* and *Batson*).

Once again, even as the court's decision was announced a concurring justice sounded a note of pessimism and presaged the need for a wholesale review of *Batson* and the system of peremptory challenges. *Miller-El v. Dretke*, 545 U.S. 231 (2005)(Breyer J. concurring)[3]

If *Miller-el* was an attempt to give more teeth to *Batson*, it has failed in Louisiana. The Louisiana Supreme Court has emphasized that *Miller-el* added no new elements to its *Batson* analysis, requiring only "a somewhat expanded review of defendant's *Batson* claims". *State v. Snyder*, 942 So.2d 484, 492 (La. 2006). The message that the Louisiana Supreme Court has taken from this Court's recent *Batson* decisions is not to give *Batson* more teeth but to emphasize the already great deference accorded trial court rulings.[4]

III. It is virtually impossible for a criminal defendant to succeed in review of a *Batson* claim under the standard of review in Louisiana.

(a) Criminal defendants almost never win on review of Batson claims in Louisiana

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[3] This sentiment has since been echoed in Mississippi and Kentucky. *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) (racially motivated jury selection is still prevalent twenty years after *Batson* and a wholesale review of the law is required.); *Morgan v. Kentucky*, 189 S.W. 3d. 99, 115-6 (2006)(Graves J. concurring)

[4] *Snyder*, 492. ("Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the Batson analysis.")

Since *Batson* there have been thirty-two[5] cases where the Louisiana Supreme Court has considered a defendant's *Batson* challenges and reached the merits of those claims. The court has also reached the merits of three cases where state "reverse-*Batson*" challenges were granted.

In that history, the Louisiana Supreme Court has granted defendants relief in only two cases. In one of those cases the trial court had not reached stage three of the analysis and the court considered the question of discriminatory intent *de novo*.[6] In the other, the sole case where the court has overturned a trial court's denial of a defense *Batson* claim, the prosecutor's stated reason for the strike was that the juror was a "single black male . . . with no children".[7] In every other case the court has affirmed, deferring to the judgments of the trial court.

Since *Batson* was announced, the intermediate courts of appeal[8] in Louisiana have reviewed 178 trial court denials of defense *Batson* challenges and have granted relief to the defendant in only four of those cases.[9]

Of those four: one decision was subsequently reversed by the Louisiana Supreme Court, which affirmed the trial court's denial;[10] another involved a trial judge who encouraged the state to discriminate to "even the score" for perceived discrimination by defense counsel;[11] another was

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[5] In two other cases that had been tried before *Batson* was announced the court ultimately ordered remands to allow hearings to be conducted. *State v. Thompson*, 516 So.2d 349, 353 (La. 1987); *State v. Ford*, 489 So.2d 1250, 1264 (La. 1986)

[6] *State v. Collier*, 553 So. 2d 815 (La. 1989)

[7] *State v. Harris*, 820 So. 2d 471 (La. 2002)

[8] The Louisiana Supreme Court hears direct appeals in death cases but may grant supervisory writs in other cases determined on appeal by one of the intermediate appellate courts.

[9] This does not count cases remanded for *Batson* hearings, those procedurally defaulted or those denied before *Griffith v. Kentucky*, 479 U.S. 314 (1987) was announced.

[10] *State v. Elie*, 899 So. 2d 689 (La. App. 1 Cir. 2005)

[11] *State v. Lewis*, 795 So. 2d 468 (La. App. 5 Cir. 2001)

to be reversed on an independent basis in any event;[12] and, in the final case, the state failed to supply any evidence of the struck juror's criminal history to support its race neutral reason to that effect.[13]

A review of Louisiana's *Batson* jurisprudence and the court's application of great deference reveals three virtually insurmountable impediments to meaningful review of trial court *Batson* rulings: trial courts rarely make an explicit finding of a *prima facie* case; trial courts usually do not articulate their reasons for denying a defense *Batson* challenge; and, great deference is granted to the trial court's ruling even when it does not reflect any reliance on matters outside the cold appellate record.

(b) In Louisiana trial courts are not required to state whether a prima facie case has been made out or not.

While the legal threshold for finding a *prima facie* case is intended to be relatively low, it places trial judges in local districts in a difficult position and there is reluctance to making a finding of a *prima facie* case.[14]

The Louisiana Supreme Court has approved a procedure whereby a request for reasons may be made by the trial court or reasons simply received from the prosecutor whether a *prima facie* case is made out or not and has not required trial courts to articulate whether such a finding has been made.[15]

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[12] *State v. Green*, 634 So.2d 503 (La. App. 4 Cir. 1994)

[13] *State v. Knighten*, 609 So. 2d 950 (La. App. 5 Cir. 1992)

[14] For an example of the squeamishness of trial judges in this respect, see *State v. Neal*, 796 So. 2d 649, 654-5 (La. 2001)(When challenged by the prosecutor after asking that reasons be provided the trial judge disavowed any finding of a *prima facie* case)

[15] *State v. Collier*, 553 So. 2d 815, 819 n.5 (La. 1989)("Of course, the trial judge may have believed there was not a prima facie showing, but still required an explanation as a precaution in the event the appellate court determined there was a prima facie showing."); *State v. Granier*, 592 So. 2d 883, 885 (La. App. 4th 1991) citing *Collier*; *State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001)

While it is true that this Court in *Hernandez* held that the question of a prima facie case may be rendered moot once an answer is proffered, this was on the express basis that the trial court "ruled on the ultimate question of intentional discrimination". *Hernandez v. New York*, 500 U.S. 352, 359 (1991).[16] This is not how the rule is applied in Louisiana.

A review of the post-*Batson* cases before the Louisiana Supreme Court shows that when faced with a *Batson* challenge in Louisiana a trial court may take a range of steps but only rarely will this involve an explicit finding that a prima *facie* case has been made out. A trial court may:

- Explicitly decline to find a *prima facie* case and receive no reasons (6 cases);[17]
- Explicitly decline to find a prima facie case but request or receive reasons for the record (7 cases);[18]
- Ask for reasons and give no indication of whether this is as a result of finding a prima facie case or for the purposes of appellate review (11 cases);[19]

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[16] In *Hernandez*, it is apparent from the appellate decision that the trial judge had regard to and accepted the prosecutor's explanation, thereby ruling on the ultimate issue of intentional discrimination. *People v. Hernandez*, 75 N.Y.2d 350, 354 (N.Y. 1990)

[17] *State v. Draughn*, 2007 La. LEXIS 10, 39-41 (La. 2007); *State v. Weary*, 931 So.2d 297, 323, 337 (La. 2006); *State v. Duncan*, 802 So. 2d 533, 543, 547 (La. 2001); *State v. Jacobs*, 803 So.2d 933, 958 (La. 2001); *State v. Bourque*, 699 So.2d 1, 7 (La. 1997); *State v. Tart*, 672 So.2d 116, 140-41 (La. 1996)

[18] *State v. Scott*, 921 So.2d 904, 944 (La. 2006); *State v. Allen*, 913 So.2d 788, 801 (La. 2005); *State v. Robinson*, 874 So.2d 66, 84-85 (La. 2004); *State v. Bridgewater*, 823 So.2d 877, 896-97 (La. 2002); *State v. Robertson*, 712 So.2d 8, 24 (La. 1998); *State v. Davis*, 637 So.2d 1012, Appendix; 1994 La. LEXIS 1327 at **67-69 (La. 1994); *State v. Code*, 627 So.2d 1373, Appendix; 1993 La. LEXIS 3431 at **118 (La. 1993)

[19] *State v. Arceneaux*, 06-KA-2986 (La. 2006) (Record lodged on appeal but not determined); State *v. Manning*, 885 So.2d 1044, 1083-84 (La. 2004); *State v. Ball*, 824 So.2d 1089, 1101 (La. 2002) ; *State v. Neal*, 796 So.2d 649, 656 (La. 2001); *State v. Taylor*, 781 So.2d 1205, 1211 (La. 2001); *State v. Tilley*, 767 So.2d 6, 13 (La. 2000); *State v. Hoffman*, 768 So.2d 542, 557 (La. 2000); *State v. Hobley*, 752 So.2d 771, 782-84 (La. 1999); *State v. Comeaux*, 699 So.2d 16, Appendix; 1997 La. LEXIS

- Remain mute and allow the prosecutor to volunteer reasons (6 cases);[20]
- Explicitly find a prima facie case and require reasons (3 cases).[21]

As a result, reviewing courts often cannot know whether the trial court ruled on the preliminary issue (*prima facie* case) or the ultimate question (credible proffer of race neutral reasons). This is not a theoretical problem and split the Louisiana Supreme Court in this case. The failure to find a *prima facie* case may arise from a legal error in understanding or applying the first stage of the *Batson* test that is masked by the absence of an explicit finding. Further, if not convinced of a *prima facie* case a trial court may never weigh and assess the credibility of a prosecutor's proffered reason.[22]

Notwithstanding this limitation, as the cases referred to above demonstrate, the Louisiana Supreme Court has applied the same standard of "great deference" to the trial court's denial of the *Batson* challenges regardless of whether a *prima facie* case has been explicitly found or not and regardless of whether the trial court has given any indication as to the basis of its ruling.

In the present case, the trial judge sat mute in the face of the *Batson* challenge and the state volunteered reasons without any finding being announced as to whether a *prima facie* case was established.

1719 at **76-77 (La. 1997); *State v. Green*, 655 So.2d 272, 286-88 (La. 1995); *State v. Collier*, 553 So.2d 815, 819 (La. 1989)

[20] *State v. Snyder*, 942 So.2d 484, 494 (La. 2006); *State v. Brown*, 907 So.2d 1, 34 (La. 2005); *State v. Broadway*, 753 So.2d 801, Appendix; 1999 La. LEXIS 2605 at **61-62 (La. 1999); *State v. Williams*, 708 So.2d 703, 727 (La. 1998); *State v. Seals*, 684 So.2d 368, 375 (La. 1996); *State v. Lindsey*, 543 So.2d 886, 898 (La. 1989)

[21] *State v. Elie*, 936 So.2d 791, 795, 799 (La. 2006); *State v. Juniors*, 915 So.2d 291, 316 (La. 2005); *State v. Harris*, 820 So. 2d 471, 474-75 (La. 2002)

[22] In Louisiana, where the trial court does not find a *prima facie* case it is unnecessary to address the credibility of the state's proffered reasons. *State v. Robertson*, 712 So. 2d 8, 24 (La. 1998)

(c) The Louisiana Supreme Court extends great deference regardless of whether the trial court articulates any reasons for its ruling.

In Louisiana, *any* ruling denying a defense *Batson* challenge will be granted great deference, even when the trial court says nothing at all.[23]

A review of the *Batson* cases decided by the Louisiana Supreme Court where a record of the trial court's stated reasons was available provided records of rulings on *Batson* challenges relating to 78 jurors.

The review showed that a trial court in Louisiana faced with a *Batson* objection where there is evidence establishing a *prima facie* case may:

- Refuse to require that any reason be given and deny the *Batson* objection on the basis that a race neutral reason is apparent from the *voir dire* examination of the juror. (3 jurors in 1 case)[24]
- Issue a bare denial of the *Batson* objection without any reasons. (14 jurors across 5 cases)[25]
- Issue a denial stating no more than that the proffered reason was race neutral. (36 jurors across 10 cases)[26]
- Issue a denial and make note of the factors corroborating the proffered explanation. (7 jurors across 5 cases)[27]

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[23] E.g. *State v Seals*, 684 So. 2d 368, 375 (La. 1996)(the trial judge's mute acceptance of the prosecutor's reasons show that they were plausible and not racially motivated)

[24] La. C. Cr. P., art. 795(c); See, *State v. Elie*, 936 So. 2d 791, 797 (La. 2006). See also *State v. Duncan*, 802 So. 2d 533, 551 (La. 2001); *State v. Jacobs*, 803 So. 2d 933, 958-9 (La. 2001)

[25] See for example *State v. Snyder*, 942 So. 2d 484 (La. 2006). Other cases were *Ball, Taylor, Robinson & Bridgewater* (*supra*)

[26] See for example, *State v. Harris*, 820 So. 2d 471 (La. 2002). Other cases were *Scott, Manning, Hobley, Green, Collier, Broadway, Juniors, Williams & Arceneaux* (*supra*)

[27] See, for example, *State v. Neal*, 796 So. 2d 649, 655 (La. 2001). Other cases were *Scott, Hobley, Comeaux & Arcenaux* (*supra*)

- Issue a denial and explicitly note an assessment of the credibility of the prosecutor or the proffered explanation. (18 jurors across 5 cases)[28]

As can be seen from the above, in two thirds of the rulings the trial court issued either a bare denial or a bare statement that the proffered reason was race neutral.

Save for *Harris* each received the same great deference and the trial courts' decisions were upheld each time.

In the present case, the trial judge issued a bare denial of the *Batson* challenge and offered no reasons.

(d) The Louisiana Supreme Court extends great deference regardless of the basis of the trial court's ruling.

The rationale for extending great deference to the trial court is that the trial judge's findings are likely to turn largely on credibility determinations. *Batson*, at n.21.

The advantage of the trial judge over an appellate court arises from the opportunity to observe the juror's demeanor and any visual or auditory clues as well as the opportunity to view the proponent of the peremptory challenge when assessing the credibility of any proffered reason.

However, an analysis of the *Batson* cases reviewed by the Louisiana Supreme Court discloses that the great deference granted trial courts in this arena may be misplaced.

The reasons proffered by the prosecution for its peremptory challenges were available[29] in relation to 90 jurors from 24 cases. Of those, the state proffered a reason that relied on visual or auditory observations of the juror in respect to only 23 jurors.

What is more, as discussed above, in two thirds of *Batson* objections where the court ruled, the court made

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[28] See, for example *State v Tilley*, 767 So.2d 6, 13 (La. 2000). Other cases were *Hoffman*, *Comeaux*, *Lindsey* & *Elie* (*supra*)

[29] The reasons were obtained either from the published decision or from the trial record lodged on appeal.

absolutely no mention of the demeanor or credibility of either the juror or the prosecutor.

In the present case, the trial court did not announce any finding as to credibility or make any findings of fact corroborating the prosecutor's reasons beyond the bare denial of the challenge.

> *(e) By its expansive application of great deference the Louisiana Supreme Court has nullified the application of* Batson v. Kentucky *in all except the most egregious circumstances.*

The Louisiana Supreme Court has elevated great deference to an almost plenary level and has refused to disturb that deference even in the presence of the types of evidence this Court observed in *Miller-el*.

For instance, in Louisiana the disparate treatment of similarly placed jurors has repeatedly been held to be insufficient to displace the great deference accorded a trial court's *Batson* denial.[30]

This continues to be the law in Louisiana even after *Miller*-el was announced, as illustrated in *Juniors*, a case where the state used four out of five peremptory strikes against African American jurors. The *Batson* challenge was denied by the trial court, stating only "All right. I find the State has given race neutral reasons."[31] On appeal the majority acknowledged that the state did not strike white jurors with similar educational levels and with similar equivocation about the death penalty. *State v. Juniors*, 915 So. 2d 291, 317-9 (La. 2005) In fact, the state made an unsuccessful cause challenge against a white juror for

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[30] *State v. Bridgewater*, 823 So. 2d 877, 897 (La. 2002) citing *State v. Taylor*, 781 So. 2d 1205, 1212 (La. 2001). Notably, in *Bridgewater* the trial court explicitly refused to make a finding of a *prima facie* case and reasons were only proffered for the purposes of the appellate record. Appellate Record R.1504-11. Great deference was accorded nonetheless.

[31] First Supplemental Appellate Record, R.354

opposition to the death penalty but seated that juror while striking a merely equivocal black juror. *Juniors*, at 342-3.

Nevertheless, the majority felt constrained to deny relief given "the vast amount of discretion to be accorded to the findings of the trial court". *Juniors* at 319; cf. *Id.* at 341 ("the majority has nullified the application of *Batson v. Kentucky* in all except the most egregious circumstances.")(Johnson J. dissenting)

Even where a reason proffered by a prosecutor is found to be disingenuous, any other reasons given will be accorded full credit and any *Batson* denial will be affirmed under the doctrine of "great deference".[32]

In *Hobley* the Louisiana Supreme Court acknowledged that proffered reasons such as "inattentiveness" must be carefully considered but then elevated the pre-eminence of the trial court's determination in such cases to an insurmountable level.[33]

Further, the court has held that even where the trial court observes disparate treatment of jurors struck because of body language, this will not justify a *Batson* challenge because the prosecutor may have had a different subjective impression from the body language. *Tilley*, at n.5.

In short, nothing has ever been held by the Louisiana Supreme Court to be sufficient to upset the great deference

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[32] *State v. Tilley*, 767 So.2d 6, 18 (La. 2000)("Although the trial court thought that a portion of the state's explanation was "somewhat disingenuous," that does not affect the legitimacy or validity of the state's other reasons.") In *Tilley* the state used 8 of 11 peremptory challenges to strike black jurors and the resulting jury had only one black member.

[33] *State v. Hobley*, 752 So. 2d 771, 784 (La. 1999)("Because the trial record cannot reflect the attentiveness of the venire members during voir dire, we defer to the trial court's determination that the explanation given was reasonable, not a pretext, and legitimately related to the particular case.") Notably, in *Hobley* the trial court did little more than note that the reason proffered was race neutral. The same approach was taken in *Williams*, another case where the trial court simply ruled that the state had supplied race neutral reasons. *State v. Williams*, 708 So.2d 703, 727 (La. 1998) & pp.76 and 161 transcript of voir dire 5/5/95.

owed to the trial court except a prosecutorial confession that she struck a juror because he was black. *Harris* (*supra*)[34]

A comparison with one of the reverse-*Batson* cases shows the Louisiana Supreme Court's deference to be all but plenary and graphically illustrates the arbitrariness of the *Batson* standard in practice.

In *Dunn,* juror Anderson (a white man) testified that he was in favor of the death penalty in most circumstances citing the case of mercy killings as an exception. *State v. Dunn*, 831 So. 2d 862, 871 (La. 2002). This was the reason defense counsel gave for striking this juror. *Id.* at 870. The trial court upheld the state's *Batson* objection to a defense strike stating, "I do not find that you stated a race neutral reason for Mr. Anderson." *Id.* The trial court stated that it reached this conclusion because the juror had stated that he would consider all mitigating and aggravating factors. *Id.*

The Louisiana Supreme Court, cited to the great deference due and the inability of an appellate court to assess intent from a cold record and affirmed the trial court's ruling and Mr. Dunn's death sentence. *Id.* at 872.

By comparison, one or another variation of "weak on the death penalty" was proffered by the state as a reason for using a peremptory strike in respect of 45 of the 90 jurors for whom reasons were available.[35] In every single case the trial court had denied the defense *Batson* objection and bound by "great deference" the Louisiana Supreme Court has affirmed.

In light of this it is perhaps unsurprising that a trial judge recently determined that Louisiana caselaw would not allow

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[34] *Harris* arose in the same judicial district as the present case. The prosecutor argued that "*Batson* is an old case" and despite the express mention of race in the proffered reason the trial court denied the challenge. *Harris*, 474

[35] The traditional reason for valuing prosecutorial peremptory strikes has been to achieve an impartial jury devoid of sympathy with either side due to shared characteristics. *Batson v. Kentucky*, 476 U.S. 79, 125 (1986)(Burger CJ) However, it is clear that prosecution peremptories are used by the state of Louisiana to select the most death prone jury possible.

him to uphold a defense *Batson* objection even though he explicitly found that the state had engaged in race and gender based discrimination and found that the state's proffered reasons were pretextual and designed to camouflage the discrimination. Having regard to Louisiana's jurisprudence and the exceptional character of the *Harris* decision, the trial judge found that the pretextual reasons were not "significantly faulty under Louisiana case law standards to constitute a violation." The conviction was affirmed on appeal and the Louisiana Supreme Court denied writs. *State v. Wilson*, 938 So. 2d 1111 (La. App. 2 Cir., 2006) writ denied *State v. Wilson*, 2007 La. LEXIS 922 (La. 4/20/07).

IV. *Batson* has failed to adequately protect criminal defendants or black jurors from discriminatory jury selection practices in Louisiana

(a) There are more reported cases in Louisiana where Batson *has been used to protect white jurors from being struck than black*

In Louisiana there are far more reported cases in which *Batson* has been successfully used to prevent defense strikes of white prospective jurors than state strikes of black jurors.[36]

Only one reported case in Louisiana applying *Georgia v. McCollum*, 505 U.S. 42 (1992) involved a defense strike of a black juror. *State v. Schexnayder*, 685 So. 2d 357 (La. App. 5 Cir. 1996)(The defendant was white and the victim black). The remaining thirteen cases involved trial courts disallowing defense strikes on white prospective jurors[37] and all save for one resulted in affirmances.[38]

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[36] Challenges by prosecutors to the defense use of peremptory strikes are known in Louisiana as "reverse-*Batson*" challenges. This type of challenge was recognized by this Court in *Georgia v. McCollum*, 505 U.S. 42 (1992)(white defendant seeking to strike black jurors)

[37] Louisiana was one of the first states to recognize the right of prosecutors to bring reverse-Batson challenges where a black defendant

(b) A comprehensive study of jury strike patterns in Jefferson Parish demonstrates that the prosecutors strike African Americans at more than three times the rate of other jurors

In Jefferson Parish a massive study of the type originally required by *Swain* has in fact been conducted. The Louisiana Supreme Court refused to consider this study in the present case as it was conducted after Mr. Snyder's trial and was not included in the trial record. *Snyder* at n.8.

However, the results of this study are relevant to this court in considering whether to grant certiorari as they illustrate the failure of *Batson* to eliminate racially disparate jury selection procedures in Louisiana.

In 2003 Professor Joel Devine, Center for Applied Social Research, Tulane University analyzed the data gathered from 390 trials, involving over 10,000 prospective jurors in Jefferson parish between 1994 and 2002.[39]

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used a peremptory strike against a white prospective juror. *State v. Knox*, 609 So. 2d 803, 804 (La. 1992)

[38] *State v. Tyler*, 723 So. 2d 939 (La. 1998) *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Scott*, 921 So. 2d 904 (La. 2006); *State v. Spencer*, 631 So. 2d 1363, 1365 (La. App. 5 Cir. 1994) writ denied 649 So. 2d 400 (La. 1995); *State v. Moore*, 640 So. 2d 561 (La. App. 3 Cir. 1994); *State v. Ford*, 643 So. 2d 293 (La. App. 2 Cir. 1994); *State v. Payne*, 657 So. 2d 531 (La. Ct. App. 1995); *State v. Ball*, 748 So. 2d 1239, 1241 (La. App. 2 Cir. 1999); *State v. Wade*, 832 So. 2d 977 (La. App. 2 Cir. 2002) writ denied 840 So. 2d 1213 (La. 2003); *State v. White*, 850 So. 2d 751 (La. Ct. App. 2003) writ denied 872 So. 2d 510 (La. 2004); *State v. Stewart*, 866 So. 2d 1016 (La. Ct. App. 2004) writ denied 876 So. 2d 832 (La. 2004); *State v. Singleton*, 2007 La. App. LEXIS 452 (La. Ct. App. 2007); cf. *State v. Wilson*, 632 So. 2d 861 (La. App. 2 Cir. 1994)(Defense challenge of two white jurors disallowed; affirmed on appeal as to one of the jurors, reversed as to the other)

[39] Professor Devine's affidavit containing his analysis and testimony from the lawyer who conducted the survey were accepted in evidence in a pre-trial hearing following the reversal in *Harris* and were filed in the Louisiana Supreme Court as an exhibit to a writ application in that case. *State v. Harris*, Sup. Ct. No. 03-KK-3549

Professor Devine's analysis concluded that prosecutors used peremptory strikes to remove 55% of African-American prospective jurors who were otherwise eligible to serve, but only peremptorily challenged 16% of white prospective jurors in the same position. *Id.*[40]

That is, despite *Batson*, African Americans are struck by the state in Jefferson Parish at more than three times the rate at which white jurors are struck. In Mr. Snyder's case African Americans were struck by the state at more than *four times* the rate of white jurors.

> *(c) In a Parish that is almost one quarter African American, black jurors make up only one twenty fifth of the jurors who have been permitted to sit in post-*Batson *murder trials ending in death verdicts*

Jefferson Parish, from where the instant case arises, is almost one quarter African American[41] and one might reasonably expect juries in the Parish to share this proportion. However a detailed review of court records discloses that this could not be further from the truth.

In short: there have been 20 post-*Batson* murder trials resulting in death sentences in Jefferson Parish;[42] records of juror race is available for 18 of these; 15 of the 18 defendants were black; more than half of the 18 death sentences were handed down by all white juries;[43] the average number of black jurors on each of the 18 trials is a half a juror; African

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[40] See also *Blackstrikes, A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office*, A Report of the Louisiana Crisis Assistance Center, September 2003 available at www.blackstrikes.com

[41] *Census 2000*, United States Census Bureau (2000) shows the African American population at 22.9%, up from 17.6% in 1990.

[42] The other three capital murder trials resulted in sentences of life imprisonment after penalty phase. A death sentence was also imposed in an aggravated rape case but this proceeding is so unique that it was not included in the above analysis – three black jurors were sat in this case.

[43] 10 trials had no African Americans, 7 trials had 1 and 1 trial had 2.

Americans make up a twenty-fifth, rather than a quarter of the jurors.

(d) Applying Batson, *the Louisiana Supreme Court reached a conclusion that there is no evidence of discriminatory intent, defying the reality of a Parish with a history of serious racial disharmony*

The failure of *Batson* in Louisiana is all the more stark when it is observed in a Parish notorious for a long history[44] of racial disharmony.

The unacknowledged reality is that Mr. Snyder, an African American, had his trial conducted before an all white jury in a Parish where only four years earlier David Duke, former Grand Wizard of the Ku Klux Klan, was serving as the duly elected state Representative.[45]

Jefferson Parish is largely made up of what are known as "white flight" suburbs and has long had a negative reputation when it comes to matters of race. The black population in Jefferson Parish has increased, growing 75% since 1980 and now makes up 23% of the Parish.[46] That influx has been met with a steady stream of racially charged incidents involving state actors, including the District Attorney's office itself.

By way of example[47]: in December 1986 Sheriff Harry

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[44] It is more than a hundred years since a lynching at the Amesville jail in 1897 added "another stain to the already scarlet record of Jefferson Parish." *New Orleans Picayune*, September 30, 1897

[45] Obviously, the same voter pool that elected Mr. Duke elected the District Attorney and the trial judge and provided the pool from which the jury was selected.

[46] *Census 2000*

[47] See Frances Frank Marcus, *Louisiana Sheriff Backed After Racial Remark*, N.Y. Times, Dec. 23, 1986, p. A17; *Barricades to Black Drivers Dismantled*, L.A. Times, Feb. 22, 1987, p. 25; Kim Chatelain and Robert Rhoden, *Duke Beats Treen by 227 Votes*, Times-Picayune, Feb. 19, 1989, p. A1; Joe Darby, *Westwego Gets Order for New Black District*, Times Picayune, Oct. 30, 1991, p. B1; Joe Darby, *Jeff Suspect Who Died Was Hog –Tied*, Times Picayune, Mar 22, 1994, p. B1; Bill Walsh, Greg Thomas, Joe Darby and Paul Atkinson, *Lee Pulls Out Cops After Two Deaths*, Times Picayune, Mar. 15, 1994, p. A1; Jeffrey Gettleman,

Lee ordered his deputies to routinely stop and question blacks in largely white areas. In 1987 the Jefferson Parish Council ordered a metal and steel barricade built in the middle of a street bordering Orleans Parish to keep the majority black residents of that parish out of Jefferson. In 1989 David Duke was elected as state representative for the 81st Representative District. In 1991 Jefferson Parish was ordered to establish its first ever majority black voting district. In 1994, two black men died in the custody of the Sheriff's department, at least one of whom was reportedly hog-tied. Reacting to criticisms, Sheriff Lee withdrew police from a black neighborhood and said "To hell with them. I don't need that. I haven't heard one word of support from one black person." In 2003 two Jefferson Parish prosecutors wore ties in court with a noose and a grim reaper painted on them at pre-trial hearings in a capital case involving a black defendant, aged just 16 years at the time of the crime. In 2005, Jefferson Parish officers were discovered to be using a homemade caricature of a black prisoner as target practice. In 2005, deputies fired over 100 bullets at three unarmed black teens, killing a 16-year old sparking allegations of racism. In 2006, in the midst of Hurricane Katrina's devastation, officers armed with shotguns blocked evacuees trying to flee New Orleans across the Gretna Bridge, sparking more outrage from black leaders.

V. The Louisiana Supreme Court's analysis on remand confirms that absent the intervention of this court, *Batson* will remain ineffective in protecting the rights of criminal defendants or black jurors in Louisiana

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Prosecutors' Morbid Neckties Stir Criticism, N.Y. Times, Jan. 5, 2003, p.114; *Target Practices*, Gambit Weekly, Apr. 12, 2005, p.19; Michelle Hunter, *Lee Backs Lethal Response To Chase: More Than 100 Shots Left Teen Driver Dead*, Times Picayune, Jun. 1, 2005, p.1; Gardiner Harris, *Storm And Crisis: Battling The Storm: Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. Times, Sep. 10, 2005, p. A13

In the instant case the prosecutor struck all of the black prospective jurors, achieving an all white jury in this black defendant's death penalty trial. The trial court said nothing in immediate response to the *Batson* challenges, the prosecutor offered reasons that applied equally to others and the trial court denied the defense motion without explanation.

The majority in the Louisiana Supreme Court has twice found that no *prima facie* case was established[48] and has given *at least*[49] "great deference" to the credibility finding it has attributed to the sphinx-like trial judge.

Instead of allowing the prosecutor to stand or fall on his stated reasons, the majority bolstered those stated reasons and the entirely unstated reasons of the trial judge by uncovering a factor said to be favorable to the state's use of a peremptory challenge that had not previously been mentioned. *Snyder*, 495.

The broad net of *Swain* was also unavailing. On remand after *Miller-el* was announced, the extra-*voir dire* statements of the prosecutor were held not to support even an inference of race based jury selection, in part because the prosecutor never referred to OJ Simpson's race. *Id.* at 499 Efforts to refer to extensive proof of systematic discrimination in jury selection in the Parish were held to be *dehors* the record; a record first established under pre-*Miller-el* law. *Id.* at 490.

Overall, the majority, appears to have engaged in an analysis that appears to draw more from the dissent, than the majority in *Miller-el*.

If the narrow and supremely deferential approach taken by the majority is accurate then *Batson* rulings in Louisiana

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[48] *State v. Snyder*, 942 So. 2d 484, 494 (La. 2006) ("Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner.") adopting the language of its original affirmance in *State v. Snyder I*, 750 So. 2d 832, 840-842 (La. 1999).

[49] Weimar J. writing for the majority concluded that "The record before us simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking Scott or Brooks." *Snyder* at 499

will remain essentially unreviewable and the promise of equal protection will continue to be frustrated.

Recognizing the problems with the state's conduct and the trial court's actions, the dissent, was unable to discern the basis upon which the defense *Batson* challenge was rejected and was unwilling to assume the existence of a credibility finding to which deference would be appropriate. The dissent correctly concluded that relief should be granted.

CONCLUSION

This court has been forced to intervene numerous times due to the failure of the Louisiana Supreme Court to accurately or effectively enforce the dictates of Equal Protection in jury selection.[50] Once again this Court must intervene to protect the rights of criminal defendants and African American jurors and correct the Louisiana Supreme court's erroneous interpretation and application of *Batson*.

However, if the Louisiana Supreme Court correctly described the *Batson* analysis, this court should still intervene because the analysis the state court described has proven itself incapable of delivering Equal Protection and if that is truly the law then it must be revisited.

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[50] *Pierre v Louisiana*, 306 U.S. 354 (1939); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); Alexander v. Louisiana, 405 U.S. 625 (1972); *Campbell v. Louisiana*, 523 U.S. 392 (1998)